ADR NEWS

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UNIVERSITY OF GLAMORGAN

"OPENING ADDRESS"

Justice in Our Own Hands : Self-help: the role of private alternatives to state intervention

by Geoffrey M Beresford Hartwell •

Justice in our own hands. What does that mean? The whole purpose of the law is to preserve the Queen's peace and to avoid the necessity for self-help. To speak of taking the law into one's own hands is to conjure up images of vigilantes and summary lynchings of innocent victims in the lawless West of the nineteenth century. So what is it that justifies our taking steps to avoid the intervention of the State in our private affairs? Indeed, what justifies a mere engineer, a lesser breed without the law, discussing what appears to be an especially esoteric branch of jurisprudence?

"Adjudication Forum"

An afternoon of papers and discussion on aspects of ADR that impact upon the construction industry, presented by the Chartered Institute of Arbitrators (Wales Branch) in association with the University of Glamorgan, Schools of "Law" and "Technology (Built Environment)" on the 3rd March 2003. The session canvassed ethical issues in private dispute resolution, dispute avoidance, management and settlement, with discussions on arbitration, mediation, adjudication and construction dispute review boards. Professor R.Neale delivered the welcome address. P.Newman presented a paper on Mediation and J.Kendall encouraged participation in pro-bono mediation work.

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I had in mind to title this address "Justice as Fairness" in tribute to the great political philosopher, John Rawls, author of "A Theory of Justice", who died in November last year at the age of 81. "Justice as Fairness" is the title of his restatement of 2001. In "A Theory of Justice", Rawls sets forth the proposition that "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. Therefore, in a just society the rights secured by justice are not subject to political bargaining or to the calculus of social interests."

That is an important proposition, and it lies, whether we are aware of it or not, at the root of the justification of ADR in all its forms.

In practice, there is a tension between this proposition of Rawls and what we understand by the Rule of Law. The Rule of Law depends upon the calculus of social interests, the one against the many, and upon the political bargaining from which legal norms are created, whether by statute or by the development of law in the Court. And realists, like Holmes the younger, face this tension by accepting that law can be structured and predicted, made objective, in a way that is not possible with the ideal of justice, subjective and perhaps unattainable.

• Eur Ing Professor of Arbitration, University of Glamorgan. Geoffrey M Beresford Hartwell, Chairman CIArb 1997.

Where there is conflict between law and justice, the realist chooses the law. The idealist may try to do justice by stretching the law, and some of the law's great developments have come about that way.

The key to the Law is that it must be fair to all men and women: predictable and consistent, whatever the circumstances. By "The Law", of course, we mean different things. Each of us uses the expression "The Law" to mean the law of our mother state. It is not an expression that has any clear and exact meaning in an international context, where one law may govern procedure, another the substance of a contract, and yet other national laws govern the capacity of the parties to enter into and perform that contract.

So, whatever proceedings are brought in the Court, they are never simply proceedings between two disputing parties. Even in the simplest dispute, there is an element of public interest, of state policy, which the Court will bring to bear. Thus, of necessity, the rights secured in the Court are influenced, to a greater or lesser degree, by laws which themselves are the product of political bargaining or of the calculus of social interests.

The balance between the objectivity of practical, positive law and the subjectivity of theories of justice is one which may become difficult when crime or social responsibility are in issue. However, there is one class of dispute for which it may be possible to achieve a result which follows more closely the subjective ideal of fairness without state intervention.

Alternative Dispute Resolution has developed over the years and has burgeoned in the latter half of the twentieth century for two, perhaps three, main reasons. I suggest that there have been two practical reasons and a moral reason. The practical reasons have to do with the business of state Courts.

Firstly, increasing Court business, both in crime and in civil actions, has meant that the state has less time to devote to inter-partes issues, matters that concern only the disputants, so that litigation has become associated with delay. Justice delayed is, of course, justice denied.

Secondly, lawyers have developed procedural skills, not to facilitate the administration of the law, but to delay it further and sometimes to frustrate it completely. There is nothing new about that, the laws delays ranked with the oppressor's wrong and the proud man's contumely in the litany of outrageous fortune that drove Hamlet so nearly to end his life with a bare bodkin.

Those are reasons to wish to avoid the Court if you seek a swift answer to a dispute. The moral justification for taking justice into our own hands, however, is of much older provenance. It lies in the notion that we have a duty to deal fairly with one another, and in the concept of accepting the judgement of one's peers. If you and I differ, we have a wide choice of ways of dealing with our differences - and they are under our control.

I'll take a moment to review the choices we have, if I may. Others will take you into the practical detail. My aim now is to show you that there is a kind of continuum of approaches and techniques open to us, whether as individuals or as commercial entities, capable of resolving all our differences at various levels.

First and perhaps safest and best, if you and I differ, we can accept our differences and walk away. Live with them. See perhaps if the passage of time will resolve them - what Beauchamp[1] called "natural death closure".

Next, if we really need an answer to our differences, we can attempt to negotiate a solution between us. That is interesting, because we are absolutely free to agree anything that suits us both as reasonably fair in the circumstances, even to the point of making a new deal altogether. Provided we do not agree to do anything that is actually illegal, we have complete freedom and the law relating to our former contract, or our former differences, is completely irrelevant.

We can bring others into our dispute. We can engage professionals to negotiate for us, but that begins to be expensive: tens, perhaps hundreds of pounds per hour.

More usually, we may look to a third party, someone we can trust, and who understands our business, to help us find a fair solution. He may be a member of the same trade association, he or she may be someone who is known to be fair-minded and knowledgeable.

There are several ways to use such a person.

- We can ask them to act as conciliator or mediator, to help us towards an agreement.

[1] Tom Beauchamp, ***"Ethical theory and the problem of closure"***, *Scientific controversies* - Englehardt & Caplan ed., Cambridge Univesity Press, 1987. ISBN 0 521 25565 1

- We can ask an expert to give us an expert opinion and we may agree to be bound by what he or she says, or we may just take that opinion into account in our negotiations
- We can give this third party the task of a so-called "adjudicator[2]", a term which has come to mean someone to give a decision which is binding, but subject to a further process, such as litigation or arbitration.
- The third party can be appointed as an arbitrator. Again we may agree to be bound by the arbitrator's decision or not as we please[3].

Some of these processes are more or less close to the law. Construction adjudication in UK is a recent creation of statute, although it has long been used in construction overseas.

Arbitration is an interesting activity, a hybrid activity, because, although its origins are in the custom and practice of merchants, it has become widely recognised in law and most countries have statutes, not to regulate arbitrations per se, but to regulate those arbitrations which the Courts are to recognise. It is quite difficult to appreciate the distinction between arbitration and processes at law, so closely have the two come together over the years. However, the distinction remains - in arbitration the parties obtain their own decisions, albeit through the agency of a tribunal they themselves have created.

False distinctions are sometimes made between these ADR processes. They are convenient for academic study, but they do not stand up to meticulous analysis. For example the twin pillars of natural justice, that no one should be judge in his own cause and that both sides should be heard, are as valid in private negotiation and decision making as they are in arbitration or in the Court. They are a moral obligation of our human condition.

It is sometimes said that a mediator cannot go on to arbitrate or adjudicate[4], yet no less a lawyer than the late Sir Michael Kerr undertook precisely that task when he was asked to do so. Isn't that the merchant tradition at work? You and I cannot agree about the quality of a cargo of beans, so we go to a colleague in the market and say to him, "Please help us to see if we can find an agreement and, if that isn't possible, we'll abide by whatever you decide." Nowadays, the Americans call it "Med-Arb", but isn't it all common sense?

And that is the keynote, the one point I wish to leave with you as we move into the more detailed forum. In Dispute Resolution, we have a choice - to have recourse to the power of the State or to adopt an alternative path and to take justice into our own hands. The great step forward of the late twentieth and early twenty-first centuries is that the judiciary and the independent dispute resolution sector, if one can call it that, are at last learning to live together.

In this University, we have been developing a theory and philosophy of Independent Dispute Resolution, because the history of the subject in both common law and continental jurisdictions has been seen as a matter of jurisprudence, rather than as I believe it to be, a matter of communication and the human condition.

For myself, I believe that John Rawls was right to argue that *each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override*. I see the use and recognition of methods of ADR, or IDR, as a practical example of that personal inviolability in action and I see the principle of Justice as fairness, another concept of Rawls, as lying at the root of all our IDR processes. My work on arbitration and IDR theory is directed to the development of that principle. I leave it to you to decide to what extent you can detect it in the interesting and practical materials which follow.

For further details on the

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[2] See, for example, the *Housing Grants, Construction and Regeneration Act 1996* at s. 108

[3] Here, consider s 58 (1) of the Arbitration Act 1996 - "***Unless otherwise agreed by the parties****, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.*"

[4] See ***Glencot Development and Design Co Ltd - v- Ben Barrett & Son (Contractors) Ltd*** (13 February 2001, TCC) http://www.adjudication.co.uk/cases/glencot.htm

Adjudication under the Housing Grants Construction and Regeneration Act 1996

By Gwyn Peredur Owen [5]

What is the object of adjudication??

To reach a fair, rapid and inexpensive determination of disputes arising under a contract. It is a judicial process to determine the rights and obligations of the parties, which will provide an impartial decision within a limited period.

What does the Act affect ??
All parties of a construction contract, which includes consultancy contracts, (with some minor exceptions, particularly where one of the parties to the contract is a residential occupier). The parties to a contract may be Employers, Designers, Architects, Engineers, and Contractors or Sub Contractors.

What can be adjudicated ??
Any dispute or difference arising under the contract.

Such disputes may be :

A failure to pay a sum of money by the due date (or at all)

Disagreement about a payment certificate, or its valuation or a valuation of an instruction

Disagreement about the final account

Disagreement about the quality of the design or workmanship

Disagreement about whether an instruction should be given

Disagreement as to whether the work is physically or legally impossible to perform

When can the dispute be Adjudicated ??
At any time – either during the term of the contract or after its completion.

Pre Contract Considerations.
The Act contains a "Scheme for Construction Contracts" which defines a "default" Adjudication Procedure. In order to avoid the use of the Scheme each contract must include its own procedure or include a reference to asset procedure (e.g. a Procedure published by such institutions as the JCT, ICE, CIC, ORSA etc.)

In order to comply with the Act each contract must contain provisions for the following:

Adjudication provision for the resolution of disputes

A definition of an adjudication procedure. This must contain eight essential features :

1. A right to give notice of adjudication at any time.
2. A Mechanism to enable an adjudicator to be appointed within 7 days of a notice of dispute.
3. Require the Adjudicator to reach a decision within 28 days of referral of the dispute to him or such longer agreed period.
4. Allow the Adjudicator to extent the 28 day adjudication period by 14 days with the consent of the Referring Party
5. Impose a duty on the Adjudicator to act impartially
6. Enable the Adjudicator to take the initiative to ascertain the facts and the law
7. All decisions of the Adjudicator shall be binding unless the dispute is finally determined by Arbitration or legal proceedings. The parties may agree to accept the Adjudicators Decision as final.
8. The contract shall provide that the Adjudicator is not liable for anything done or omitted in the discharge of his functions.

Definition of payment instalments

A mechanism for determining the value of work done

Dates when payments become due

Dates when final payment become due

If any of the above provisions are not incorporated into the contract then the Scheme for Construction Contracts will apply either in full or in part as relevant as an implied term of the Contract.

Of special note in the Act are the following two provisions :

Pay-when-paid clauses are banned

A provision exists for a party to determine the contract of payments are not made by the due dates

[5] MSc BSc FCIArb FconsE Ceng FICE, Chartered Arbitrator, Adjudicator & Mediator.

Who can act as Adjudicator??

The Adjudicator must be a natural person acting in his personal capacity - i.e. an individual and not an employee of any of the parties and must be impartial. He may be named in the contract or agreed by the parties, if not then he may be nominated by and Adjudicator Nominating Body (ANB – e.g. RIBA, ICE, CIArb., CIOB, RICS etc.) Any objection to the nomination will not invalidate the Adjudicator's decision. In order to avoid enforcement problems with the Adjudication Decision care must be taken to ensure that the person chosen as adjudicator is suitably qualified and accredited.

How long will the Adjudication take ??

Normally 36 days. The time period is very short. The Act requires that an Adjudicator is both appointed and the Referral of the Dispute given to him within 7 days of the issue of a Notice of Dispute. He then has only 28 days to make a decision. The period of 28 days may be extended by 14 days by the Referring party only, or to any other period by the agreement of both parties.

What is the Procedure ??

The procedure is determined by the Adjudicator, and has basically four stages.

1. The issue of a Notice of Dispute by the Referring Party
2. The Appointment of an Adjudicator and the Referral of the dispute to him
3. The process and procedure of the Adjudication
4. The issue of the Decision

1. The Notice of Dispute

The procedure of adjudication is begun when the Referring Party sends a Notice Of Dispute to the Other Party which will be short and will normally contain four main elements :

Description of the Dispute

Where and when it has arisen

Nature of the redress sought

Names and addresses of the parties

2. Appointment of the Adjudicator and the Referral of the Dispute

The Referring Party then proceeds with the appointment of an Adjudicator, either by using the named or agreed adjudicator, or by requesting a suitable adjudicator to act, or by asking an ANB to appoint a suitable person.

The Referring Party then presents to the Adjudicator his Referral Notice which should contain all the documents and statements upon which he intends to rely. Copies of the Contract Document indicating the agreed adjudication procedure should also be included. Copies of the Referral Notice must also be sent to the Other Party.

This entire procedure must be completed within 7 days of the Notice of Dispute.

The Other Party must immediately upon receipt of the Referral of the Dispute documentation, read the submission, ensure that they understand the points raised and proceed with their defence. There can be no counter claim – it is only the matters mentioned in the Notice of Dispute, which may be adjudicated. Any counter claim must be the subject of a further adjudication – which with the agreement of the parties may be taken into consideration. However any joining of disputes will complicate the adjudication and may be counter productive to what should normally be a simple, speedy procedure of resolution

3. The Process and Procedure of Adjudication

The Adjudicator has complete control of the procedure, unless agreed otherwise by the parties and he will indicate to the parties who will do what and when. Normally upon receipt of the Referral of the Dispute the Adjudicator will issue directions as to the conduct of the adjudication.

The non-referring party will need time to respond to the Referral of the dispute, however this time will be short and normally limited to either 7 or 14 days. A site visit and a meeting of the parties will only be held if the Adjudicator considers it necessary. He may need to carry out some tests and may nominate others to undertake these tests on his behalf and he may require advice for some other party in order to ascertain the facts and the law.

The parties shall comply with the instruction and requests of the Adjudicator, however the adjudicator will proceed with or without the requested information - silence or non-compliance with his instructions will not invalidate his decision.

The Adjudicator only has 28 days to complete the procedure and reach his decision.

Bearing this in mind all submissions to him must be limited in volume, concise and clear. He does not have time to wade through volumes of lever arch files, and if presented with a voluminous reference will make whatever observations he considers equitable in order to arrive at his decision. This may mean he will not be in a position to read any but the highlighted sections of the paperwork. If he considers he does not have enough data, he will always request further and better particulars prior to coming to his decision. He may ask the parties for a concise summary of the information provided.

4. ***The Decision***

The decision will be final and binding, unless the dispute is finally determined by legal proceedings, arbitration or by agreement. This does not mean that a party can ignore the decision and just apply to the court or opt for arbitration. An early judgement in the Technology and Construction Court between ***Macob Civil Engineering Ltd. and Morrison Construction Ltd.*** held that the decision of the Adjudicator is immediately binging and any non compliance with the decision will be default. This means that if the adjudicator has decided upon a payment of money, this must normally be done immediately. If he has granted an extension of time or required some instruction to be issued by the certifier, then if this is not done the Employer may be put in breach of contract, and the parties themselves in default of the adjudication decision.

The consequences of the Decision may be swift and severe and the insurers of the parties and those who may be affected are well advised to be made aware of the procedure and its progress.

How much does it cost ??

The parties are normally jointly and severally liable to the Adjudicator for his fees and reasonable expenses. The adjudicator may however direct in his decision that a Party shall pay all or part of the fees and expenses. His fees will normally be based on an hourly rate and his expenses at cost. An adjudication for a fairly straightforward dispute may take the adjudicator anything between 15 and 50 working hours to complete. In simple document only cases this may be reduced.

The parties themselves will normally be liable for their own costs and expenses (this may vary by agreement or from one procedure to another).

The simple nature of adjudication is such that the parties may elect to prepare their own submissions and defence. This will certainly reduce the costs of representation or legal advice to a minimum – if any. As there is a further final stage to the resolution procedure available (legal or arbitration) then there may be merit in reducing costs to a minimum in adjudication in order to obtain immediate relief to a problem, which may be further considered at a later point in time, if necessary.

NOTES :

- The above is an extremely brief overview of the HGC&R Act and is given as and illustration only of the main elements of the Act and how simple it will be to utilise its provision to resolve disputes which may otherwise be protracted and expensive to bring to a conclusion.
- The Act is designed to give speedy and economic relief to the parties of a contract.
- Advice should be sought if contemplating utilising any adjudication procedure or utilising the implied terms which may be incorporated into your contract by default.
- Particular care should be taken prior to enacting the right of determining the contract due to then non payment of an amount due remaining unpaid by the due date.
- It should also be considered that Adjudication may become a useful and economic tool for the determination of a Final Account, particularly where traditional protracted negotiations may be time consuming and expensive.
- Various books and publications have appeared dealing with the Act and copies of the Act itself may be obtained from HMSO.

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DISPUTE RESOLUTION BOARDS AND THE DRBF

By Corbett Haselgrove Spurin

INTRODUCTION

Dispute Review Boards (DRB) were developed in the United States, as a response to the need to find a better way to prevent / settle disputes in the underground construction industry. From early inception to the present time, Dispute Review Boards have evolved into an effective and efficient mechanism for both the prevention and if necessary, the settlement of disputes between Government employers and Prime Contractors on major government infrastructure development contracts such as highways, railroads, airports and government buildings including hospitals and schools in the US and beyond.

The Dispute Review Board Manual,[6] produced in 1996 provides the only definitive guide to the operation of DRB's to date. The authors and many of the contributors, early DRB pioneers and practitioners, formed the **Dispute Review Board Foundation**[7] (DRBF) in 1996. The DRBF is a non-profit corporation dedicated to the resolution of construction disputes through the use of DRBs and to the furtherance of the DRB concept.

The DRBF has now changed its name to the **Dispute Resolution Board Foundation** and has almost 500 members spread over 30 countries world wide. Reflecting the Foundation's change of title and the focus on the resolution of and not the mere review of disputes, the term Dispute Resolution Board is used here in preference to the term Dispute Review Board. The goals of the DRBF are :

- Education
- Networking
- Member & training directories
- Newsletter, specifications & other publications
- Public awareness
- Maintenance of a DRB database
- International presence

HISTORY OF DRBs

The first official use of a DRB was made by the Colorado Department of Highways on the second bore of the Eisenhower Tunnel project after the financial disaster encountered on the first bore between 1968 and 1974. In the contract documents for the second bore, the Colorado Department of Highways required a review board to make non-binding recommendations concerning disputes that arose during the course of the project. Although organization of the board was not required to be done until it was needed, the parties agreed to organize the board from the beginning of the project and the board operated without much guidance concerning process.

Following the successful use of the DRB on the second bore project, the Colorado Department of Highways used DRBs on the electrical and finish work on the tunnel, two later tunnel contracts and two large bridge projects. The process was also used in 1980 in the El Cajon Hydroelectric Project in Honduras, the Mt. Baker Ridge Highway Tunnel in Seattle, for the approaches to the tunnel and for the Chambers Creek Tunnel project in Tacoma, Washington. Boston's Central Artery Project, Cal Trans, and the Florida and Washington DOTs continue to use DRBs on all large projects as well as the Southern Nevada Water Authority. The Dallas Area Rapid Transit District will have DRBs on the Garland and North Lines, which are now starting to bid. Five mega-projects (over $ US 1 billion) with DRBs are currently under construction around the world.

In addition to the increasing usage of DRBs, the construction industry has seen the use of DRBs spread from tunnel projects to all types of construction, and from large, complex projects to small, relatively simple projects.

GLOBAL USE OF DRBs

Dispute Resolution/Review Boards have been successfully used outside the USA, in particular in relation to the development of the Hong Kong Airport and are now routinely used in international construction contracts on FIDIC terms. In England DRBs are currently in use on over 20 projects including the new Channel Rail link. DRB's have been adapted to regulate relationships between the Government and Public Finance Contractors under the PPFI initiatives, whereby the contractor finances the development rather than

[6] Matyas, R.M., A.A. Mathews, R.J. Smith and P.E.Sperry. Construction Dispute Review Board Manual, McGraw-Hill, 1996. Note that the 2nd edition is due to be published in October 2003. This article draws heavily on DRBF guidelines and specifications.

[7] See http://www.DRBF.org DRBF 6100 Southcentre Blvd. Suite 115 Seattle, WA 98188-2441 USA

being paid to build the facility and subsequently operates the resultant infra-structure development as a business venture to recoup investment costs. The DRB remains active both during the construction and concession/operation stages, with necessary changes to membership of the board as circumstances require. The new Athens Airport represents such a collaboration between a German Company and the Greek Government and the refurbishment of Amman Airport likewise involved a collaboration between a French Company and the Jordanian Government. The World Bank mandates Dispute Review Board dispute avoidance and settlement mechanisms on all new World Bank financed construction contracts, contracting on FIDIC terms.

DRBs – AN EVOLVING CONCEPT

The processes employed by dispute review boards have evolved over an extended period of time. The original architects of the process had no model to follow and had to "**make it up**" as they went along. The process evolved to fulfil perceived needs, namely to prevent disputes arising and if and when a dispute materialised, to resolve it principally through consultation with a fallback advisory process utilizing industry experts in the event that case managed consultation failed to end the dispute. The advisory process is essentially non-legal, contemporaneous and non-adversarial, leading to an expeditious and cost effective resolution of the dispute.

Whilst the DRBF has worked tirelessly to develop the DRB process, providing reasoned guidelines as to what it proposes are best practice, with severe warnings about the proven dangers of deviating from the DRBF recommended rules, even the DRBF recognises that the domestic US and international construction industry requirements are not the same. A number of variations of dispute review board process[8] are now available, with the most significant variations pertaining to outcome, mainly to address concerns about the value of non-binding, evidentially admissible recommendations in overseas jurisdictions. There is no consensus as to which, if any, of the models is the most effective. It is likely that different models offer both advantages and disadvantages. This paper seeks to analyse the respective advantages and disadvantages of DRBs with differing outcomes.

THE AIMS OF THIS PAPER ARE : To examine :-

i) what dispute review boards seek to achieve,
ii) the common mechanics of all forms of DRB process and
iii) the impact that differing outcomes have on the process and its effectiveness in different socio-economic conditions.

THE OBJECTIVE OF THIS PAPER IS: To enable the reader to reach a considered opinion as to which models of DRB are most suitable for use on different types of project, reflecting local jurisdictional factors.[9]

WHAT IS A DRBF DRB ?

- The Board is a panel of three construction industry experienced (mainly drawn from civil engineers, architects and contractors), respected, impartial reviewers.
- The parties, i.e. the Employer/Developer and the Main Contractor / Prime, each appoint a board member. The board members jointly recommend a third member for appointment / approval by the parties. The board then appoints one of the members as the chair, which may be, but does not have to be, the third member appointed.
- The Board is (ideally) organized before construction begins
- The Board is provided with contract documents
- The Board becomes familiar with the project and the participants
- The Board meets with the owner/contractor representatives on regular site visit
- The Board encourages resolution of disputes at job level
- The Board hold hearings and makes non-binding recommendations which are admissible as evidence

[8] Many of the variations are neither recommended nor approved by the DRBF.

[9] For a consideration of the potential use of DRBs in the UK see Steven John, *DRBs in the Context of UK Construction*. www.nadr.co.uk/articles

HOW A DRBF DRB IS ORGANISED

- The Owner evaluates the applicability of using a DRB for the proposed project
- The Owner decides to use DRB
- The Owner includes DRB specifications and a 3-party agreement in the bidding documents
- After the contract has been awarded each party nominates one member to the board
- The parties approve each other's nominee
- The first two members are provided with the contract documents
- The first two members then select a third member to the board
- Both parties approve third member
- The third member receives the contract documents
- Three-party agreement is signed by all concerned (Owner/Prime & board members)
- Organizational meetings held to establish how the board will operate and to draw up a time table for meetings.

DRBF DRB RESPONSIBILITIES

- To schedule, hold and attend periodic site-visits – followed by general meeting and discussion with party representatives – maintenance of record of proceedings - often followed up by a site report.
- To keep abreast of activities and developments
- To encourage resolution of disputes by parties
- When a dispute is referred to it, to conduct a hearing, complete deliberations and prepare a timely recommendation

WHAT DISPUTE RESOLUTION BOARDS SEEK TO ACHIEVE? The purposes of the DRB process, according to the DRBF, are to :-

1 **Identify problems in advance and provide an informal mechanism for solving issues before they develop into disputes.**

Identification of problems : Regular site visits are scheduled into the DRB program. The full board, accompanied by representatives of both parties (but not lawyers), tours the site at the commencement of the program and at regular intervals thereafter, followed by an informal board meeting. The board has to take care to ensure that it is not separated or addressed by one party alone without the presence of the other representative. The board is advised of progress on the aspects of the program visited and of any difficulties that have arisen and how these are being addressed. The visits often result in problems being identified and recognised by both parties and frequently arrangements are immediately put in place to address the issues thereby preventing them from developing into disputes. The board can instigate discussions by inquiring about aspects of the work which are not raised directly by the parties.

The informal mechanism : The role of the board in all of this is very much hands off and investigatory only. The board does not, under the DRBF model, fulfil a mediation role. Where a board attends partnering meetings, it merely observes but does not take part in discussions, though the board may put forward issues for the partners to discuss. A strict requirement of the DRBF is that the board does not discuss or recommend construction **WAYS AND MEANS** or concur with the opinion of either representative on appropriate construction practice. Rather the board acts as a catalyst for discussions between the parties.

The board has to tread a very fine line here to ensure that it does not engage in an advisory role. Any recommendation or endorsement of the views of either party could subsequently jeopardise the impartiality of the board if it is subsequently called upon to settle a dispute. It is inevitable that the board will become privy to information during site visits and by being present during discussions between the representatives that a tribunal would not ordinarily become aware of in the absence of

express disclosure by the parties during the course of a trial. This does not appear to have caused any problems in the US, but in the light of the **Glencot**[10] ruling in the UK, the contract language providing for a DRB in the UK should perhaps contain an express reference to the potential risk to justice inherent in the prior knowledge of a tribunal of facts and events which may not be expressly pleaded by either party coupled with an agreement by the parties to accept to undertake that risk.

Some analogy may be drawn here to the modern case management role played by judges and increasingly by adjudicators and arbitrators. During case management meetings it is not unknown for the judge/arbitrator to provide the parties with an indication as to how they feel about the respective strengths and weaknesses of the case before them and how they are leaning. However, it is absolutely essential to make it clear that nothing has yet been decided and that the board is still open to persuasion. This enables the parties to concentrate on relevant issues but also has a very strong coercive element to it.

The absence of lawyers at this stage should encourage the parties to consider practical as opposed to legal solutions to their problems. The objective is inter-party co-operation in the informal resolution of problems rather than an adversarial forum for third party dispute resolution. Thus, the board acts as a conversational orchestrator, the chairperson(s) conductor(s) of a symphonic dispute dialogue, delicately balancing the power of the voices to induce a harmonious outcome.

2 **Provide a mechanism for the settlement of on-going construction disputes, involving the assistance of an independent panel of industry experts.**

In the event that the parties fail to broker an informal resolution of a dispute either party may refer that dispute to the board. The board will schedule a hearing, inviting both parties to file statements of claim, defence and counterclaim (if any) in advance. At the hearing each party will be afforded the opportunity to present their case and challenge the other party. Whilst the attendance of lawyers is discouraged, it is normal for lawyers to attend and advise the parties, but the lawyers do not act as advocates. The parties make their own presentations. The aim is to make the process as informal and non-adversarial as possible.

Under the classic DRBF model the board then retires and produces an advisory opinion. Whilst a unanimous opinion is preferable, a majority opinion is permitted. The parties receive the opinion or opinions as soon as possible but preferably within two weeks of the hearing. Statistics indicate that in excess of 98.8% of cases the parties have accepted the opinion and implemented the recommendations of the board. The advisory opinion is admissible in evidence in the event of subsequent litigation of the dispute and to date, it would appear that US judges have always adopted the advisory opinions in their judgements so that no advisory opinion has as yet been successfully challenged in court.

3 **Minimise the cost to the industry traditionally arising out of the litigation of disputes.**

The first bore of the Eisenhower Tunnel Project resulted in a financial litigation disaster for all concerned. By contrast it appears that no major litigation has arisen out of any project utilizing a DRB in the US. Whilst the costs of initiating and maintaining a DRB are not inconsiderable, they pale into insignificance compared to the legal costs involved in litigation and thus, there is an assumption that the use of DRBs is cost effective. Clearly DRBs minimize the risk of a disputes proceeding to litigation.

4 **Provide a speedy mechanism that prevents damage to the interests of both parties.**

The DRB mechanism is designed to both prevent disputes occurring and further to identify and resolve disputes within a four to six week timescale. This is very much on par with the adjudication process used in the UK. There is little disagreement with the view that the speedy resolution of disputes is advantageous to all concerned and prevents further damage to their interests.

5 **Preserve the working relationship between the parties.**

The informal settlement stage is expressly aimed at preserving working relationships. The non-adversarial nature of board hearings is more conducive to the maintenance of relationships than adjudication, arbitration or litigation, particularly since adoption of the advisory opinion is consensual.

[10] Glencot Development and Design Co. Ltd v Ben Barrett & Son (Contractors) Ltd [2001]BLR 207. TCC

6 **Keep disputes out of the public arena as much as possible.**
The DRB process, in common with mediation, adjudication and arbitration is a private matter, but of course, if the opinion is not accepted then any subsequent litigation would put the matter into the public arena.

7 **Provide industry informed solutions to disputes.**
The appointed members of the board are likely to be architects or civil engineers, the traditional construction industry professionals in the US. Unlike the UK quantity surveyors in the US do not enjoy the same level of professional status and recognition. Increasingly the chair, the third person appointed by the appointees is often, but not necessarily, a construction lawyer chosen for the ability to administer the process and formulate the opinion.

COMMON MECHANICS OF DRBF DRB PROCESSES

- **The dispute resolution process is provided for in the contract.**
  This is not mandatory and the parties can agree to initiate a DRB after the event, though in the absence of a contractual provision they are unlikely to do so. DRBs are mandated for public projects in a number of States in the US.

- **A five way contract is established between each member and the parties and between members.**
  The contract governs not only relationships between the parties but also the duties of the board members to each other and to the parties.[11]

- **The board is appointed before work commences.**
  This is a matter of best practice. The identification and prevention role of a DRB is lost if a DRB is only appointed after a dispute has arisen.

- **Board members are supplied with all necessary documentation in advance.**
  The appointed board members will receive the documentation and make their joint selection of the chair on the basis of the nature of the project as disclosed by the documentation. It is essential that the board gets up to speed on the project before meeting if it is to fulfil its functions effectively.

- **The board meets on a regular basis, is updated by the parties on progress during site visits and provides both informal and formal facilities for the settlement of disputes as they arise.**
  The identification and prevention role of the DRB is dependent upon regular meetings and statistics indicate that infrequent boards result in a higher incidence of dispute board hearings. Because DRB costs are paid in arrears after the event, there is a temptation to try and save money by not convening regular meetings. Clearly, if the result is extended DRB hearings then avoiding meetings is not in fact cost effective. A commitment to regular meetings is therefore highly desirable.

- **The board ceases to exist when the project is completed.**
  Given the fact that many disputes do not arise until after a project is completed and frequently involve disputed final accounts this is a rather strange rule. Outside the US it is common for the board to cease upon settlement of the final account, though there is a case for the board to continue in existence to deal with any subsequent disputes arising prior to the ending of the limitation period for claims. The rule however may acknowledge that the non-judicial and non-legal nature of the board means that it is not best suited for purely legal argumentation.

- **Lawyers play a less significant role than in arbitration and litigation. The objective is for the parties to set out their views in a non-legal manner whenever possible.**
  This is clearly the case in the US. However, in the Dispute Arbitral Board model used outside the US lawyers play a far more significant role.

- **The board is party appointed, one from either side and the third by the appointees. The objective is to achieve a balanced board with wide but differing expertise.**
  It is possible for an outside organisation to appoint the board, but the DRBF does not offer this service, merely providing a list of DRBF qualified persons and leaving it to the parties to make their own

[11] See p12 below regarding sub-contractors

selection. This may change following complaints that some DRBF members have undertaken excessive workloads and a quota system may be introduced in the future.

- **Majority outcomes are permitted.**
  Unanimous outcomes are the norm but majority recommendations are permitted. However, since both the majority and minority opinions are admissible in subsequent litigation proceedings the publication of the minority opinion is not universally accepted as being beneficial to the process, since it undermines the authority of the majority recommendation.
- **The parties share the costs equally.**
  There is no concept of costs following the event, which reduces the risk of a party pursuing a dispute to the bitter end, simply because having spent so much on the dispute to date, the party cannot take the risk of settling if their remains an outside chance of recovering costs.
- **Members are paid on an equal, pro-rata basis.**
  Members are paid for their time and input on an hourly basis. Since the chairman is likely to spend more time on administration and report writing than the other members, this ensures that the chairman's efforts are fully rewarded.
- **Either party can refer a dispute to the board.**
  As with adjudication or arbitration, since the DRB acts as a pre-requisite to litigation, either party can make a reference and not simply a claimant.
- **All members are neutral and serve both parties equally and fairly.**
  This mirrors the rules about the role of party appointed members of arbitral tribunals which has been widely canvassed elsewhere, and thus will not be discussed further here.
- **Only the full board** *(never a part board)* **meets, particularly on site visits. The board never meets with parties without inviting both parties to attend. The board will not meet with a single party without the permission of the other party.** *(see above)*
- **All communications are shared with all other parties and members. Wherever possible telephone conferencing is used to avoid any perception of bias and to obviate allegations of breach of due process.**
  Written communications to individual board members are no problem since the board member can copy and circulate the communication to the other party and the other board members. The greatest problem arises out of casual meetings and in particular private telephone calls to individual board members. Casual meetings should be terminated promptly but politely without any engagement in discussions. Likewise, with telephone calls, the board member should ascertain if something needs urgent discussion then arrange for a return conference call involving all three members. It was a failure to follow these prescriptions that resulted in Mr Casey, a board member being lawfully dismissed by his appointing party in **L.A. County Metropolitan Transportation Authority**.[12] Mr Casey also made the mistake of advising that he had prejudged a case that had not yet been fully presented to the board.
- **Members may not receive payments in cash or kind from one party.**
  This includes free transportation and accommodation.
- **Members are absolved from any personal or professional liability arising out of DRB activities.**
  As with arbitrators and adjudicators this ensures that members do not avoid making difficult decisions for fear of upsetting a party and incurring the risk of litigation. This does not however prevent a court as in **LA CMTA v Shea-Kiewitt-Kenny** from removing a member for breach of due process, but prevents an action for professional negligence.

POTENTIAL BARRIERS TO THE USE OF DRBs

- **Departure from traditional practices**
  There is always a reluctance towards trying something new. Education as to the proven benefits of DRBs is essential to its future growth. Resistance will be reduced as newcomers to the industry are

[12] Los Angeles County Metropolitan Transportation Authority v Shea-Kiewit-Kenny 97 C.D.O.S. 8960 California CA

exposed to the concept during training. The provision of DRB clauses as alternatives in standard form contracts such as FIDIC helps to give the process credibility. Statutory provisions mandating DRBs have had a similar impact on the use of DRBs in the us to the HGCRA in respect of adjudication in the UK.

- **DRBs do not add value**
  In common with the establishment of partnering arrangements and the use of insurance, the DRB involves expenditure to prevent something happening. Adopting a DRB requires a pro-active rather than reactive approach. The key to promoting the use of a DRB lies in terms of securing the stable doors before rather than after the horse has bolted. It is better to spend a little to save a lot. The DRB is an investment.

- **DRBs impose their own concepts of fairness and equity**
  This is an understandable though unjustified fear. Firstly, the process is about helping the parties to identify and solve their own problems. Secondly, the board does not deal with **WAYS AND MEANS** then the problem is reduced. Finally, having an experienced third party available to make a recommendation is in fact usual and traditional to the industry, as seen by the common use of arbitration and contract administration.

- **DRBs promote claims**
  DRBs promote the early identification of problems and their early resolution. The small number of references of disputes to the board indicates that rather than promote claims, DRBs reduce claims and court action is virtually unknown.

- **Lack of qualification and potential for bias**
  The question of judicial / legal qualifications is raised equally in respect of adjudication and to a lesser extent in respect of arbitration. Increasingly, the chair tends today to be legally qualified. However, most experienced DRB panellists will have had considerable construction contract experience.

  The bias issue is similar to that in respect of the party appointed arbitral panel. The duty of all three panellists is to the project not to their appointing party and the existence of the third party provides a final check against bias. The biggest danger is that during the early stages of a board, before any dispute arises, that ill will might develop between one party and the board. It is thus essential that the board acts in an open and independent manner at all times, providing equal access to the board to both parties during joint sessions and never engages in private communications with either party.

- **Lack of project-specific knowledge**
  If this objection is to have any credence whatsoever, then a fortiori all other processes will be even less connected to the project, since this is the only process where the board becomes intimately associated with the project from inception through to completion.

- **Prolongation of claims process**
  As with adjudication and arbitration, the fear is that the DRB provides yet another level of dispute resolution between the commencement of a claim and its final resolution by the courts. The reality is that a claim is unlikely to be settled judicially in less than two years whereas a DRB will normally bring a matter to a conclusion within six weeks. If the claim does go to court, the maximum prolongation is a mere six weeks.

- **Prejudice resulting from disclosure**
  This relates back to the **Glencot** issue and whilst a real issue, is one which the parties have to consider and either decide to undertake or reject. It is both a strength and a weakness, depending on one's viewpoint and is thus either acceptable or objectionable.

- **Promotion of acrimony and posturing**
  This is a real possibility if the board lacks the necessary inter-personnel skills. However, the non-adversarial nature of board proceedings should assist in limiting acrimonious relations between the parties and reduce the potential for posturing.

- **Lack of legal procedures and standards**
  The central remit of all the new wave dispute resolution processes, be it adjudication, fast track arbitration, paper only arbitration, mediation, conciliation and the DRB is trade off between the cost and time involved in fully fledged judicial type processes against a light legal touch, with minimum legal procedures and standards. Essentially all lean towards a quick, dirty rough form of justice rather than a "Rolls Royce" product. The proof of the pudding is in the eating and to date it would appear that client satisfaction with the product is high. Adverse judicial comment on the process is distinctly lacking at the present time.

COMPARISION OF DRBs TO OTHER THIRD PARTY PROCESSES

- **Tends to promote bilateral agreement**
  Whilst it is commonly stated that up to 97% of all civil cases settle before trial, the value of the DRB is that even less cases are submitted to the board and virtually none have gone to trial to date.
- **Facilitates positive relations**
  Many of the parties using DRBs are repeat contractual players. The main Prime Contractors appear to successfully bid for further work indicating a high degree of
- **Facilitates open communications**
  The principal purpose of the site visit is to get the parties to talk to each other at the job face, in an informal manner.
- **Facilitates trust and cooperation**
  Open communication and the early disclosure, discussion of issues prevents the feeling that the other party has things to hide and thus promotes trust and cooperation in reaching solutions.
- **Minimizes aggregation of claims**
  As with adjudication the aim of the DRB is to identify problems as they arise and deal with them incrementally, avoiding multi-faceted legal claims at the end of the project.
- **Minimizes posturing**
  The convening of a hearing is a last resort, so with no gallery to play to, opportunities for posturing are reduced. The fact that the parties speak for themselves rather than legal representatives further encourages plain, straight forward dialogue as opposed to skill fully drafted presentations.
- **Encourages identification, evaluation and dealing with claims in a prompt business-like manner / leading to early identification, analysis, and resolution**
  The site visit provides the ideal medium for identifying problems and instant evaluation by the parties followed by practical solutions, before the lawyers can get involved and start to explore legal loop holes, justifications and exceptions, thereby avoiding obtuse legal technicalities.

BENEFITS OF USING THE DRB PROCESS

- **High resolution rate**

DRBF Statistical Database - Cost Savings (as of September, 2002)

• **Total projects (since 1988)**	**920**
• **Total value of projects**	**$US73.4 billion**
• **Disputes settled**	**1125**
• Acceptance rate	97.6%

Only 26 disputes have gone unsettled.

"*The DRB process appears to be effective in assisting in the resolution of disputes, leading to more tiemely completion of projects, reduced cost overrunns, and avoidance of claims. Utilizing DRBs on larger projects can serve to motivate greater cooperation between parties resulting in fewer unresolbed claims and a reduced litigation potential.*" [13]

[13] The Office of Inspector General for the Florida DOT. Audit report of DRBs active during the calendar years 2000 and 2001. The objective was to evaluate the performance of DRBs and assess their effectiveness in resolving disputes.

- **Provides an impartial forum**
  The main difference between the DRB and other forms of ADR is that the parties have a considerable lead in time to any dispute, during which the impartiality of the board can be nurtured and reinforces, resulting in a high degree of confidence by the parties in the impartiality of the board. The **Los Angeles County Metropolitan Transportation Authority v Shea-Kiewit-Kenny** case is the only known example to date of an allegation of impartiality against a DRB. The track record compares very favourable with adjudication and arbitration.

- **Provides informal and rational basis for resolution (political cover)**
  A major barrier to negotiated settlements is that management is often unwilling to make any concessions or accept responsibility for problems since they may be held to account for unjustifiable losses. The formal and even the informal advice of the board provides managers with justification for both concessions and payouts. This is particularly so for managers in the public sector who might otherwise be exposed to adverse public political comment.

- **Parties are normally predisposed to DRB proceedings**
  The parties usually find it easier and more comfortable to discuss matters themselves with fellow construction professionals then they would setting out their stall to lawyers or even having their case put for them by lawyers.

- **Reduces transactional costs & legal and consulting fees**
  The average rate for a DRB member is £1,000 per day, resulting in a fee of approximately £3,000 per site visit plus expenses. Since much of the attendance costs of the parties on a standard basis would be spent in management processes in any case the uplift cost is minimal. Whilst an adjudication or arbitration would only result in costs if a dispute occurs, the DRB will involve in a minimum fixed cost expenditure, dispute or no dispute. However, in the event of a dispute, compared to the costs of litigation, the marginal costs of a DRB dealing with a claim represents a potential for significant savings, particularly since legal representation costs for a half or one day hearing and even the preparation for it are likely to be relatively modest. Hearing time is reduced because the board is already up to speed with what is going on on-site.

- **Reduces lost productivity time**
  As with adjudication, a six week turn around on a dispute ensures that a site will not be put on hold for any significant period of time awaiting a decision.

- **Better informed decisions**
  Decisions are likely to be better informed, firstly because the board will already be up to speed with site activity and contract documentation and secondly because the board is composed of industry experts rather than legally trained judges with no industry experience. The viewing of project/issues concurrent with construction of the project is the greatest benefit of the DRB process and sets it apart from other ADR processes.

- **Lower bids because of lower bid risk premium**
  As time goes by, the proven track record of dispute free programs has resulted in a lowering of premiums, which in turn facilitates competitive bidding which does not have to factor in a percentage to cover the risk of additional expense and delay associated with disruptive disputes.

THE NINE ESSENTIAL ELEMENTS OF A DRB ACCORDING TO THE DRBF[14]

The principal developmental work on DRBs has been carried out in the US with the majority of DRBs being used on public projects. The DRBF stages regular consultation events with its members, collating information about DRB practice and gradually refining the process on the basis of local experience. The DRB has made little impact on private work, possibly because most large projects are carried out in the public sector. Whilst the DRBF continues to experiment with variations on the process, the following are deemed to be essential for domestic DRBs :-

[14] Matyas, R.M., A.A. Mathews, R.J. Smith and P.E.Sperry. Construction Dispute Review Board Manual, McGraw-Hill, 1996.

1. All three members of the DRB are neutral and subject to the approval of both parties
2. All members sign a Three-Party Agreement obligating them to serve both parties equally and fairly
3. The fees and expenses of the DRB members are shared equally by the parties
4. The DRB is organized when work begins, before there are any disputes
5. The DRB keeps abreast of job developments by means of relevant documentation and regular site visits
6. Either party can refer a dispute to the DRB
7. Once a dispute is referred, an informal but comprehensive hearing is convened promptly
8. The written recommendations of the DRB are not binding on either party but are admissible as evidence, to the extent permitted by law, in case of later arbitration or litigation.
9. The members are absolved from any personal or professional liability arising from their DRB activities.

It should be noted that these basic essential requirements are quite terse and are not filled with restrictive detail and are thus open to quite broad interpretation.[15]

Fees : No guideline is provided at 3 as to what amounts to reasonable fees and expenses. Some DRBs are paid travel and accommodation expenses but others are not, which limits the pool of members that can be viably appointed to local practitioners. In international DRBs members are often paid not only travel expenses but also for the time involved.

Financing the DRB : There is no definition at 5 of what "regular site meetings" means. Clearly, there is a need for flexibility and the number of site meetings required and their regularity is likely to vary from project to project. However, unless a fixed minimum budget is established at the outset, whereby the board is remunerated perhaps through a retainer, there may be a temptation for the parties to keep visits to a minimum in order to save money.

Procedure : Rule 4 provides no guidelines as to procedure merely requiring the DRB to be "organised" at the outset. How a hearing is organised is therefore very much a matter for the board in consultation with the parties during initial meetings when the powers and regulations should be drawn up and agreed. This reflects the notion of "***party autonomy***" central to the Arbitration Act 1996 and puts the parties in charge of practice and procedure. Nonetheless, the parties are likely to be highly reliant on the board for advice as to what is desirable. This emphasises the need for the board to contain at least one experienced member. Procedures should be both informal but comprehensive in line with the requirements of due process.

Outcomes : The US experience on the value of non-binding but admissible written recommendations has not been replicated outside the jurisdiction. Non-binding mediation, non-binding conciliation and even non-binding consultation reports have been attempted in the UK but they are not that common in the construction industry. In the UK the immediately enforceable, temporarily binding adjudication process has become a central feature of the construction industry dispute settlement process, frequently reinforced by a fall back arbitral provision to provide final determination where necessary. On the international scene arbitration remains the principle dispute resolution process used by the industry, though the FIDIC contract provides a Dispute Arbitration Board facility. The intended outcomes therefore provides the most significant point of variation between US and over-seas DRB practice. However, once the outcomes change, then some variation in procedure must necessarily follow from that change of outcomes.

SUB-CONTRACTORS AND THE DRB[16]

Whilst the relationship between prime and subcontractor is often critical to the success of a project, traditionally sub-contractors are not parties to the DRB process. Some success has been achieved in incorporating DRB processes into sub-contracts.[17] The two problems with doing so are related :-

[15] Appendix A : The Dispute Review Board Administration and Practice Workshop : DRB Guide Specifications p32 provides some additional advisory information on best practice. Sample Clauses and Guidelines are contained in the Chairing Workshop Manual.

[16] See also The Dispute Review Board Administration and Practice Workshop p31.

[17] See further R.Faulkner, C.Haselgrove-Spurin & G.Slaughter : Arbitration Innovations, DRBs and Adjudication. ABA International Arbitration News Vol2 No2 2002 p14

Firstly, to the fact that relative to the whole project individual sub-contractor presence is limited, which means that whilst the developer/prime have time to establish a firm relationship with the board, the same is not true of many sub-contractors who may be less inclined to devote time to site visits by the board. The same problem is evident with sub-contractor / partnering relationships. The board may have to make many short visits to a number of sub-contractors during a single visit resulting in a loss of focus and little opportunity for building relationships.

Secondly, the DRB fixed costs are marginal compared to the value of the main contract. It is less easy to justify such expenditure in respect of smaller value sub-contracts. With the value of each sub-contract varying considerably, a complex formula would be required to share the cost between a number of sub-contractors. The most simple way of approaching the cost issue therefore is for the prime to establish a sub-contract DRB for use by all sub-contractors and to bear all the costs of site visits by the board, with the individual sub-contractor contributing only to board hearings of disputes in which they are involved.

It may be that the DRB process is too cumbersome and not best suited to sub-contract dispute resolution. For this reason the use of adjudication is possibly more appropriate and cost effective. Adjudication is aimed at the rapid settlement of disputes and thus its objectives are compatible with DRBs, though admittedly adjudication is not aimed at identifying problems and preventing disputes from arising. Where the sub-contractor participates actively in the partnering process, a mechanism will exist for early identification and prevention.

PARTNERING AND THE DRB[18]

Even though the objectives of Partnering and DRB processes are broadly similar, namely the reduction of construction disputes that go to litigation, the methodologies involved are quite different and in many respects incompatible.

Partnering aims to identify problems at an early stage and encourages cooperation to provide solutions. The assumption is that the use of partnering prevents disputes from occurring, which would suggest that there is no need for a DRB on partnering projects. However, it is not uncommon for state legislation to require both partnering and a DRB. It is thus essential to ensure that the DRB can operate effectively within a partnering project.

Where partnering and the DRB run into conflict is in respect of the resolution of disputes. Whereas both encourage the parties to broker their own solutions, the DRB initially facilitates this by acting as a sound board, whereas in partnering the partners have to find the solution without outside assistance. Partnering relies upon a commitment to the project and the other partners as an incentive to solution finding and thus requires the parties to subordinate their self interest to the group's broader mutual objectives. The DRB on the other hand encourages pragmatic solutions that protect each parties interests.

If no solution is brokered at during the early consultative stage the DRB moves immediately to board, ensuring rapid resolution of disputes, whereas partnering engages in the stepped escalation or elevation of the dispute through an ascending hierarchy of seniority within each organisation. It is only when the highest levels of officialdom fail to broker a settlement that the dispute moves to a resolution process. It is suggested that partnering and DRBs can only work effectively together if the elevation system is dispensed with and any failure to broker a settlement during early partnering meetings results in the dispute being sent to a DRB.

The schism between sub-contractor and DRB and sub-contractor and partnering projects are in some ways very similar with subcontractors being left out of the loop in both processes. Partnering works best between the principal partners who are present throughout the project and less well for minor sub-contractors. It is common for many minor sub-contractors not to be effectively linked into the partnering process. Similarly, as noted above, the central remit of the DRB is between developer and prime with provision for sub-contractors only being occasionally made within the process.

[18] See also The Dispute Review Board Administration and Practice Workshop p27.

VARIATIONS ON DRB's BY REFERENCE TO COMPOSITION[19]

The three member DRB panel is the most common. However, single member DRB's agreed by the parties from a short list, or nominated by an independent nominating body have been used for smaller projects which do not justify the cost and expense of a three person board. They have attracted a number of nomenclature including "mini dispute resolution board" and "Dispute Review Advisor" or DRA.

The principal advantage is cost and flexibility in terms of availability and minimal organisation, whereas the main drawback is limits to expertise available to the parties. The advice from a three person board is highly persuasive.

The single board member fits in very neatly with different forms of intended outcome such as enforceable decisions as in adjudication and arbitration and the use of these models are discussed further below.

VARIATIONS ON DRB's BY REFERENCE TO OUTCOMES

This is the most common point of variation. Possible variations include :-

- **Non-admissible advisory opinion – Non Admissible DRB.**

This is a form of non-binding mediation / conciliation. Whilst these have been experimented with and have the advantage that there is no risk to the parties from actively participating in the process, the problem is that experience indicates that outcomes are routinely ignored and thus are of little value. On the other hand, it is arguable that the board can play a far more active role and has no need to be "hands off" when it comes to providing advice and could even engage in discussions in respect of WAYS AND MEANS, adopting an essentially consultative role. The danger is that this could step on the toes of the professional advisers on the construction team and result in a battle of egos.

- **Binding conciliated / mediated settlement - DMedB**

  Binding mediation processes have been used with apparently some degree of success by the industry.[20] Mediation has a proven dispute resolution track record and there is thus no reason why a standing mediation board which develops an intimate knowledge of the project and the respect and confidence of the parties cannot produce even better results than an ad hoc / post dispute mediation process.[21] As with all mediation processes, the parties maintain control over outcomes which provides the parties with a high degree of protection and security. Mediation is a private process and often involves the use of industry experts. It is considered to be a timely, relatively inexpensive process and user friendly process. However, as with the DRB process, there is considerable variation in what is deemed to be appropriate procedure, with some mediators taking a far more pro-active role than others.

  The mediation process is purely consensual but the outcome, assuming there is one, whilst consensual in formulation is binding, that is to say it results in a legally enforceable agreement. The potential for a failure to broker a settlement means that it is advisable for the parties to provide a fall back process to resolve outstanding disputes where a mediated settlement cannot be achieved. Thus a follow on arbitration clause is advised if litigation is to be avoided, particularly since arbitration reinforced by the enforcement provisions of the 1957 New York Convention on the Enforceability of Arbitral Awards renders arbitration a far more attractive international construction dispute resolution process than domestic litigation.

  Can the same body both mediate and arbitrate ?[22] The advantage of using a DMed/ArbB is that an independent arbitrator will lack the intimate knowledge of the project and the carefully nurtured relationship with the parties that is enjoyed by the traditional form of DRB. There are two distinct schools of thought on this issue. The **Glencot** decision echoes the fears of those opposed to the Med/Arb

[19] See also The Dispute Review Board Administration and Practice Workshop p29.

[20] Resolex Ltd provide a "**CONTRACTED MEDIATION**" service which they proclaim ensures that no disputes will arise during the construction process. http://www.Resolex.com

[21] See further on the nature of mediation C.H.Spurin The role of Lawyers and Mediations in the Settlement of Construction Claims. www.nadr.co.uk/pulbications/articles

[22] See Peter Talbot, *Should an Arbitrator or Adjudicator Act as a Mediator in the Same Dispute ?* Arbitration Vol 67 2001 p221 : Geoffrey M Beresford Hartwell, *Mediation and Adjudication : Glencot*. Arbitration Vol 67 2001 p341 : Haig Oghigian, *Arbitrators Acting as Mediators*. Arbitration Vol 68 2002 p42 : T.Bingham : *Transcendental Mediation*. Building 18 Jan 2002.

process, who believe that prior knowledge represents a serious threat to the impartiality of the decision maker. On the other hand, Med/Arb is considered to be a fair, practical and cost effective way of producing informed decisions.

Mediation is effective in the US and UK because the courts support the enforcement of settlement agreements. Where the assets of the paying party are located outside the jurisdiction it is important to ensure that the settlement agreement is made subject to the jurisdiction of that other state where the funds are located. This is only effective if the jurisdiction is able and willing to promptly enforce settlement agreements.[23]

- **Adjudication – immediately enforceable temporarily binding decision - DAdjB**
  Adjudication is now an established construction dispute settlement process in the UK. Since the process is mandated in the UK, at the behest of either party to a relevant construction contract, adjudication posses serious problems to the adoption of the DRB concept in the UK without modification to render it compatible with the Housing Grants Construction and Regeneration Act 1996. Whilst the Act requires adjudication facilities to be made available in a relevant construction contract, and the provisions of the Act and the Scheme apply to any non-conforming contract, the form that the adjudication can take is quite flexible. There appear to be no reason why the contract cannot provide for a DAdjB to provide the adjudication facility in fulfilment of the requirements of s108 HGCRA 1996.

The advantage of so doing is that whilst this preserves all the advantages of using the adjudication process under the HGCRA, including the judicial enforcement procedures, the use of a DRB provides a very satisfactory solution to the complaints from various quarters that adjudicators have too little time to do justice to the process when confronted with complex disputes and large amounts of documentation. Since the DAdjB will already be familiar with the contract documentation before a dispute is referred to it, the board will be in a far better position to reach a fully considered and reasoned decision. Whilst most adjudications do not involve a hearing the DAdjB would automatically involve hearings.

The change of outcome would have implications for the nature of the process and it is likely that in order to ensure full compliance with the requirements of natural justice, lawyers would have to be afforded a right of audience and not play a mere advisory but non participatory role. The danger is that the process could become too adversarial, something which is avoided in the paper only adjudication process and the traditional DRB.

A back up arbitration process should be provided to ensure finality without recourse to the courts, firstly if the parties deem that preserving confidentiality is essential and secondly if the contract is international – a DAdjB/Arb process.[24] It would not be possible to have a DAdj/ArbB process since the adjudicator could not review his own decision. The arbitrator has to be a separate and distinct body. Whilst care is required to ensure that the parties are made fully aware of the risks of prior disclosure of information, as required by **Glencot**, it should be noted that this is somewhat like the model used by the World Bank on FIDIC terms under the current Clause 67. An added sophistication here is that the board's recommendation becomes a final award (not a decision) if no application is made for arbitration within 56 days of issue of the "recommendation." In effect the nature of the outcome transforms from a recommendation into an arbitral award by default and passage of time.

The potential draw back to international adjudication is that the jury is out on whether or not the New York Convention on the Enforcement of Arbitral Awards would apply to an adjudication decision, though the most likely conclusion is that it does not. A DAdjB/Arb process would allow a follow up procedure in the event of non-compliance but the unique feature of immediate enforceability for the decision would be lost. It is suggested that since the parties will have agreed that the decision, for better or for worse, is to be enforceable, then a fast track arbitral process on the enforceability of that promise could provide an effective means of securing rapid enforcement of the decisions. The arbitrator could

[23] Lebanese courts for instance do not recognise settlement agreements.

[24] On the value of adjudication as an international process see T.Bingham : Managing for Better Building. www.nadr.co.uk/articles/publication

exercise a similar jurisdiction to that of the courts in enforcement procedures of HGCRA adjudication decisions and refuse to declare the decision enforceable on the grounds of breach of due process. A failure to comply with the arbitral award would of course attract the enforcement powers under the New York Convention on the Enforcement of Arbitral Awards.

- **Arbitration – immediately enforceable final binding decision - DArbB**
  Much of the discussion above regarding the nature and value of a DAdjB is equally relevant to the DArbB process, particularly regarding the role of lawyers in the process. The main difference is that there is no failsafe mechanism apart from Judicial Review. The parties have to have confidence in the process from the very start and be prepared to live with the award whether they like it or not. The DArbB process has the value of instant finality and broad global enforcement under the New York Convention on the Enforcement of Arbitral Awards. It ensures that there is little to no prolongation of the dispute resolution process, which can be very attractive in its own right. It at least promotes certainty and the ability of the parties to put the matter to rest and get on with business once the award is delivered. Whilst the adjudication process benefits considerably from a requirement that the adjudicator provide a reasoned decision, where confidentiality and rapid finality are desirable it is possible for the DArbB process to specify that the award be delivered without reasons, rendering judicial challenge even on the grounds of breach of due process virtually impossible.

CONCLUSIONS

The value of the original DRB concept globally is questionable since there is no guarantee that courts around the world will accord the same degree of respect for the advice of the board that has been accorded to the process in the US. Nonetheless, there is significant scope for use of the process in an adapted form, though it may be necessary to tailor the process to local jurisdictional requirements. It is submitted that the track record of the process justifies the effort. It has proved to be a far more effective mechanism for preventing problems developing into full blown disputes than any other process, including partnering though in appropriate circumstances both DRB and partnering may be valuably used on the same project.

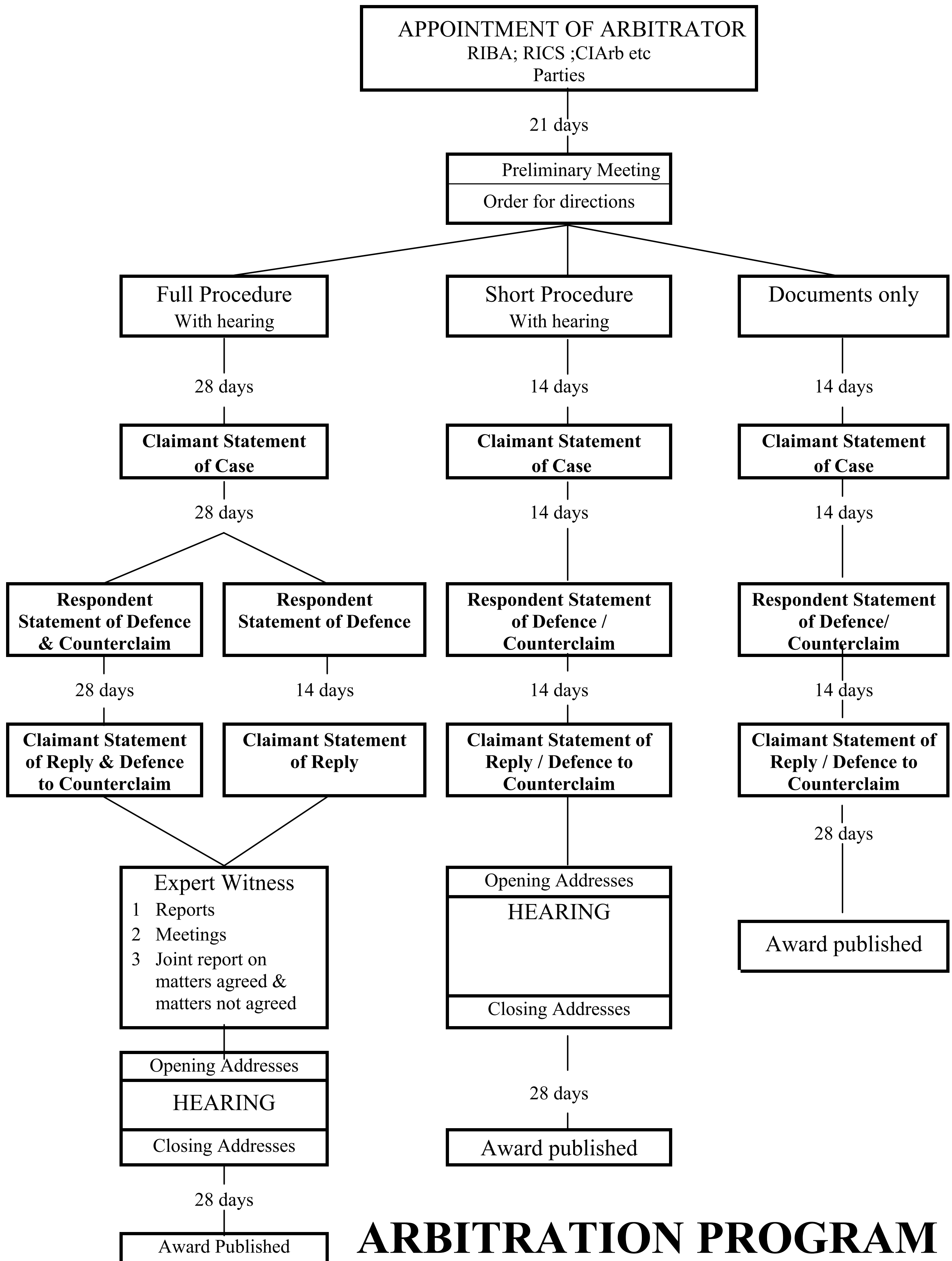
Whilst the DRB process has been mainly confined to public projects, there is little reason why the process cannot be valuably used by the private sector for larger projects and most specifically to deal with relationships between the developer and prime contractor. However, smaller projects may not justify the expense of using even one person DRA and in such circumstances the use of adjudication may be more appropriate.

The hybrid DAdjB process has much to commend it in that it combines the advantages of both adjudication and the DRB process. In particular, the failsafe protection of an additional layer of decision making provided by the concept of immediately enforceable temporary finality means that it would also be possible to use the same board for sub-contractor disputes. Whilst the board is likely to have developed deeper relationships with the developer and prime, there is no reason to believe that the board would be prejudiced against sub-contractors and is in fact likely to have a better grasp of the global dynamics of the project which favour neither the interests of the developer nor the prime.

The skills involved in participating in a DRB are in some ways similar to mediation, adjudication and arbitration but are also quite distinct in other respects. It is essential that prospective DRB panel members receive adequate training and that the specifications of any DRB or DAdjB are drawn up appropriately. Finally, it should be noted that however good and effective a dispute resolution process is, it is no substitute for good clear contract drafting to avoid ambiguity, uncertainty and to provide clear guidelines as to how to deal with the usual vicissitudes of the building process.[25] It is often a failure to contract on concise and fair terms that leads to disputes in the first place. Dispute Resolution is not a the ideal way of amending poor contracts and no more than a court of law can a Dispute Resolution process render an "*unfair*" contract "*fair*".

[25] See further regarding international construction dispute settlement C.H.Spurin *Mediating and arbitrating manufacturing construction contract disputes.* 9th Annual AFA Conference. Cairo http://www.nadr.co.uk/publications/articles

"ARBITRATION PROCEDURES [26]



ARBITRATION PROGRAM

[26] © 2003 by Dr Mair Coombes Davies, Architect, Barrister, Adjudicator, Mediator.

ARBITRATION REFERENCE: 000.00

IN THE MATTER OF THE ARBITRATION ACT 1996

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:

M

Claimant

and

CD

Respondent

Draft / **SCHEDULE OF ARBITRATORS FEES**

Fees

1. Hourly rate £000.00
   Daily rate (hearings) £000.00
   Preliminary fee £000.00. Payable at the reference commencement.
   Travelling expenses At net cost. First class travel, refreshments and four star hotel accommodation where an overnight stay is necessary. Car mileage at 00 pence per mile.
   Disbursements At net cost.

2. VAT shall be added at the appropriate rate.
3. The above rates shall apply to all time spent upon or reserved for the arbitration.
4. The foregoing rates apply for time spent in the twelve months after the date of this appointment. The rates will be subject to review on the expiration of the twelve months and on an annual basis thereafter.
5. Fee accounts may, at the arbitrator's discretion, be issued at the commencement of the arbitration and thereafter at no less than monthly intervals.

Hearings

6. Where time is reserved for a hearing non-returnable security shall be provided at 100% of the full daily rate, plus VAT, for each day reserved. Until security is provided any dates reserved will be provisional.
7. The arbitrator may direct that such security shall be paid by either the claimant or the counterclaimant or by both parties in such proportions as the arbitrator deems appropriate.
8. Where a hearing date has been fixed and is subsequently cancelled, the arbitrator reserves the right to charge a cancellation fee of the following proportions of the fees that would have been payable had it proceeded:
   i. If cancelled at more than 2 weeks notice 75%.
   ii. If cancelled at less than 2 weeks notice 100%.

Payment

9. Payment is due within 10 days of date of invoice.
10. The parties shall be jointly and severally liable to pay to the arbitrator the arbitrator's fees and expenses.
11. Interest on overdue payments shall accrue at 10 per cent over Bank of England base rate.
12. Should the payment of the whole or a part of any fee account be unduly delayed the arbitrator is entitled to take such action as the arbitrator may consider appropriate in the circumstances including charging for any action taken to recover the fees.

Signed:………..………………… **Signed:**………………………………………

Name &.Address....................................... *Name &.Address*...

....

....

Date:………………………………...…..2003 *Date:*................……………………………..2003

Claimant **Respondent**

ARBITRATION REFERENCE: 000.00

IN THE MATTER OF THE ARBITRATION ACT 1996

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:

M

Claimant

and

CD

Respondent

Draft / PRELIMINARY MEETING AGENDA

Appearances

1. Claimant.
2. Respondent.

Arbitration jurisdiction

3. Acts
   - i Arbitration Act 1996.
   - ii Other
4. Regulations.
5. Terms of arbitration clause within parties contract.
6. Applicable arbitration rules.

Outline of dispute

7. Claim
   - i. Subject.
   - ii. Value.
8. Defence / Counterclaim
   - i. Subject.
   - ii. Value.
9. Issues.

Jurisdiction

10. Do any questions of jurisdiction arise.

Procedure

11. Whether:
    - i. Full procedure with hearing.
    - ii. Short procedure with hearing.
    - iii. Procedure without hearing - documents only.
      Arbitrator reserves right to convene meeting / hearing if documents raise issues which in arbitrator's opinion cannot be satisfactorily resolved on documents only.

Pleadings

12. Claimant to serve Statement of Case by …
13. Respondent to serve Statement of Defence (and Counterclaim if any) by …
14. Claimant to serve Statement of Reply (and Defence to Counterclaim if any) by …
15. Statements:
    - i. Each Statement to be accompanied by a list of documents and a copy of every document intended to be relied upon. The part relied upon within each document to be clearly identified.
    - ii. Statements in Reply may contain evidence and submissions in rebuttal of material contained in opposing party's Statement of Case.

16. Claimant to serve a list of agreed issues by…

Full procedure with hearing

17. If full procedure with hearing (pleadings as above):

18. Statements of evidence of witnesses of fact, to stand as evidence in chief, exchanged by…

19. Experts:
    - i. Number.
    - ii. Discipline.
    - iii. Expert witness reports exchanged by…
    - iv. Experts of like disciplines to meet without prejudice by…
    - v. Experts of like disciplines to prepare a joint report on matters on which they are agreed and not agreed by…
    - vi. Experts' reports to stand as evidence in chief.

20. Parties opening addresses served by…

21. Venue for hearing:
    - i. Barristers Chambers, 30 Park Place, Cardiff.
    - ii. Other....................Reserved by Claimant / Respondent.

22. Provisional date for commencing hearing …

23. Parties to send to arbitrator by…
    - i. Agreed time estimate for hearing failing agreement each party's estimate.
    - ii. Names of those (if any) who will represent each party.
    - iii. Numbers likely to attend hearing.

24. Transcript of hearing:
    - i. Is not required.
    - ii. Is required and will be arranged by Claimant / Respondent.

25. Parties written closing addresses exchanged by…

Short procedure with hearing

26. If short procedure with hearing (pleadings as above):

27. Claimant and Respondent exchange summary of oral submissions by …

28. Date of hearing …

29. Parties to send to arbitrator by…
    - i.Names of those (if any) who will represent each party.
    - ii.Numbers likely to attend hearing.

30. Transcript of hearing:
    - i.Is not required.
    - ii.Is required and will be arranged by the Claimant/Respondent.

Award

31. Interim award. Dealing with the issue of liability / quantum / other…Thereafter there will be a further meeting to consider what further directions are needed.

32. Final award.

Communications

33. Communications to the arbitrator:
    - i. To be made by e-mail, fax, post, or telephone to arbitrator's clerk.
    - ii. A copy of any communication to be sent to the other party.
    - iii. An indication to be given that a copy has been sent to the other party.

Arbitrator's terms

34. Agreement of the arbitrator's standard scale of charges and terms of engagement.

Costs

35. Provisions as to costs.

Any other business

ARBITRATION REFERENCE: 000.00

IN THE MATTER OF THE ARBITRATION ACT 1996

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:

M

Claimant

and

CD

Respondent

ORDER FOR DIRECTIONS NO.1

Upon hearing .... on behalf of the Claimant and .... on behalf of the Respondent at the preliminary meeting held by telephone conference on 2003

The following directions are given

And it is ordered that:

Award

1. An award shall be made on the following issues:
   1.1 ....

Procedure

2. The Claimant shall serve a Statement of Case by 4.00pm on .... 2003.
3. The Respondent shall serve a Statement of Defence by 4.00pm on .... 2003.
4. The Claimant shall serve a Statement of Reply, if so advised, by 10.00am on .... 2003.
5. Each Statement shall be accompanied by:
   5.1 Written statements of any oral evidence intended to be relied upon.
   5.2 A list of documents and a copy of every document intended to be relied upon. The part relied upon within each document to be clearly identified.
6. The Claimant and the Respondent shall each serve a summary of their oral submissions by 4.00pm on .... 2003.
7. The Claimant and the Respondent shall send to the Arbitrator by 4.00pm on 2003:
   7.1 Confirmation that the Claimant will be represented by .... and the Respondent will be represented by .... at the hearing referred to in paragraph 8 below.
   7.2 The names and status of those who will attend the hearing referred to in paragraph 8 below.
8. There shall be a hearing at 10.00am on .... 2003 at .... which will be reserved by the Claimant.

Communications

9. Communications by the Claimant and the Respondent to the Arbitrator shall be made by e-mail, fax, post or telephone to the Arbitrator's clerk.
10. A copy of any communication by the Claimant or the Respondent to the Arbitrator shall be sent to the other party and an indication shall be given that a copy has been sent.

Arbitrator's fees and expenses

11. The Claimant shall immediately obtain and forward to the Arbitrator and the Respondent written confirmation on headed paper from the .... that the fees and expenses of the Arbitrator shall be paid by ....

Costs

12. The Claimant and the Respondent shall immediately confirm in writing to the Arbitrator their agreement that each party shall pay its own costs of the arbitration.

DATED 2003

M. Coombes Davies

Arbitrator

ARBITRATION REFERENCE: 000.00

IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN THE MATTER OF AN ARBITRATION
BETWEEN:
M
Claimant
and
CD
Respondent

ARBITRATION HEARING AGENDA

Arbitration hearing to be held at 10.00am on .... 2003 at ....

Timetable[27]

10.00am Opening

11.15am Short adjournment.

11.30am Re- commencement.

1.00pm Lunch

2.00pm Re-commencement.

3.15pm Short adjournment.

3.30pm Re-commencement.

4.45pm Conclusion.

Procedure

1 Opening of arbitration hearing. Arbitrator

2 Claimant's case.

Opening statement on behalf of the Claimant. ....

Claimant's witnesses[28]:

1. *(Name and position)*...

2. *(Name and position)*...

3. *(Name and position)*...

4. *(Name and position)*...

3 Respondent's case

Opening statement on behalf of Respondent ....

27 Times are provisional.

28 Evidence from each witness will be given as follows:

- The witness will take the oath or affirmation.
- The written statement of each witness will stand as the evidence in chief of that witness but the witness may be asked relevant supplemental questions by the representative of the party calling that witness.
- Cross examination of the witness by the representative of the other party.
- Re-examination of the witness by the representative of the party calling that witness on relevant points raised in cross examination and not already covered in evidence in chief.
- If a witness is the representative of a party then he shall give such further evidence in chief and at the conclusion of cross examination as the Arbitrator may order.
- The Arbitrator may seek information from the witness either after re-examination or at any time during the course of the witness's evidence.

Respondent's witnesses

1. *(Name and position)*...
2. *(Name and position)*...
3. *(Name and position)*...
4. *(Name and position)*...

4	Closing statement on behalf of Respondent	....
5	Closing statement on behalf of Claimant	....
6	Closing of arbitration hearing.	Arbitrator

Award

7 The Arbitrator will give a written award.

by Dr Mair Coombe Davies

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****

UNIVERSITY OF GLAMORGAN

C.I.Arb Fellowship
ARBITRATION AWARD
WRITING COURSE / EXAMINATION

London In association with the **School of Law**

CHARTERED INSTITUTE OF ARBITRATORS

FOR GRADUATES OF THE UNIVERSITY OF GLAMORGAN LLM IN COMMERCIAL DISPUTE RESOLUTION

Dates

Monday 15th September to Friday 19th September 2003

Classes will take place Monday to Thursday 9:00 – 5:00 with the award writing exercise taking place 12:00 – 4:30 on Friday.

(The course will be repeated in September 2004)

Venue

Glamorgan Business Centre

Fees

The fees for the course are £600 inclusive of course materials, morning and afternoon beverages and mid-day finger buffet, and an evening meal on Friday after the course.

Accommodation

Accommodation in halls is available at £20/night Bed and Breakfast to be booked direct with the Accommodation Office.

Course Text

Berger Claus Peter – Arbitration Interactive. -available from Peter Lang AG over the net at www.peterlang.com

Applications and Administration

Helen Merchant, University of Glamorgan Commercial Services.
HLMercha@glam.ac.uk.

Adjudication Forum at the University of Glamorgan 3rd March 2003

The Law School University of Glamorgan

LLM/Postgraduate Diploma/Postgraduate Certificate *Commercial Dispute Resolution*

About the Course

The primary aim of the course is to provide a stimulating and challenging intellectual environment where legal education crosses new frontiers, exposing students to innovative methods of resolving commercial disputes, as well as understanding the philosophy behind the human desire to dispute, so equipping them to increase their personal and professional development.

The course aims to prepare students for professional practice in commercial dispute resolution through a 'learning and doing' approach, and in particular to represent clients in Arbitrations, Adjudications, Conciliations and Mediations. Students can expect to be faced with simulations of the types of dispute in which they could be involved.

Course content (*Credits in Brackets*)

Core Modules:

- Substantive and Procedural Law of Arbitration (20)
- Dispute Resolution (15)
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- Private International Law (10)
- Research Skills (10)
- Obligations (10) (ICE 1)*
- Dissertation (60)

How will you study

The scheme will be taught via a combination of lectures and small group activities with the emphasis on the latter. Students will be expected to have prepared thoroughly and to participate fully in all teaching and learning activities. Much of the assessment during the scheme is continuous, practical and skills based. Great importance is placed on modern methods of teaching and the use of technical facilities, in particular video recording is used extensively in advocacy, mediation and conciliation training and skills teaching generally.

Optional Modules:

- Public International Law (10)
- Litigation Strategies (10)
- Admiralty Law (10)
- Carriage of Goods (10)
- Commercial Law (10)
- Construction Practice (10) - (ICE 2/3)*
- Construction Law (10) (ICE 2/3)*
- Employment Law (10)
- Environmental Law (10)
- Family Law (10)
- Finance Law (10)
- Health Law (10)
- Trade Law (10)
- Marine Insurance (10)

* ICE 1,2 and 3 can be studied alone or as part of the LLM

What will I get for completing the course : An LLM Degree plus :-

The LLM is fully validated by the Chartered Institute of Arbitrators, enabling successful graduates to apply for membership status of the CIArb. By successfully completing an additional Arbitration Award writing course and examination, graduates will have fulfilled all ***academic*** requirements for fellowship status (fellowship is also subject to fulfilment of the pupilage requirements of the CIArb).

Graduates will receive practice certification for mediation practice. Adjudication practice certificates apply to the relevant construction modules. Whilst the course covers the ICE syllabus and the University of Glamorgan is an examination centre for ICE, the external ICE examinations must be successfully completed in addition to the LLM in order to satisfy the requirements of the ICE.

The course may be studied full time over one year, or part time over two years.

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